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No. 09-_____

Supreme Court, U.S.
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In The

Supreme Court of the United States

JIMMY DOUG SHELTON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether searches conducted by a private party who is acting as a government agent are subject to the warrant requirement of the Fourth Amendment, when that private party would otherwise have the right to conduct such searches?

II.

Whether it is illegal for the government to permanently seize evidence from a defendant's home without a warrant when the actual search of the defendant's home was legal?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Jimmy Doug Shelton, Petitioner;
2. The United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jimmy Doug Shelton respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 2009, to address the important questions of federal law presented herein, and the resolve the conflict among the federal Courts of Appeals on the questions raised by this proceeding.

OPINIONS DELIVERED IN THE COURTS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is *United States of America v. Jimmy Doug Shelton,* Docket No. 07-60943. The District Court for the Northern District of Mississippi court order denying the Petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 is listed as document 455 in Case 1:00-cr-00127-WAP. The report and recommendation of the United States Magistrate Judge recommending that the motion to be suppressed be granted is listed as document 314 in Case No. 1:00-cr-00127-WAP.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment of the Court of Appeals was entered on June 30, 2009. A petition for panel rehearing was timely filed, as was denied on September 09, 2009. The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 13.3, and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their Persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

In 1991, Jimmy Doug Shelton, a lawyer practicing in Tupelo, Mississippi, married Cheryl Wheeler. From the time of their marriage, until April 27, 1997, the two lived in a house owned solely by Shelton. On that date, Cheryl Wheeler moved out of the house, with no intention of ever returning (Motion Hearing Transcripts, Volume I, page 143 lines 8-15), and with the additional intention of ending the marriage. She left behind some clothing, some photographs, and some furniture. By the middle of May 1997, she had taken all her personal effects from the house by using the house key she retained. Shelton was aware that Cheryl Wheeler was entering his house from time to time after April 27, 1997, but only permitted her to enter his house to retrieve personal effects and mail.

Unbeknownst to Jimmy Shelton, the Internal Revenue Service had begun a criminal investigation of Shelton in March, 1997. The IRS suspected a licensed bingo operation of under-reporting income received. The IRS Agents conducting the

investigation had recruited Cheryl Wheeler's sister, Debbie Wheeler, as an informant. Debbie Wheeler was an employee of Shelton in his law practice.

Almost immediately after Cheryl Wheeler moved out, her sister Debbie told her of the criminal investigation, and arranged for Cheryl to meet the IRS agents and the Assistant United States Attorney supervising their investigation. This meeting took place on May 5, 1997. It is undisputed that from May 5, 1997 forward, Cheryl Wheeler began acting as a paid informant for the Internal Revenue Service, *i.e.*, she became an agent for the Government. It is also beyond dispute that between May 5, 1997 and August 8, 1997, Cheryl Wheeler conducted at least nine (9) searches of Shelton's house, and seizures of evidence from it, all at the behest and under the direction of the Government. While these searches and seizures were sometimes combined with trips to retrieve mail, and other personal items, the primary purpose of the visits was to further the Government's criminal investigation.

Jimmy Doug Shelton was charged in a fifty-count indictment with various crimes arising out of a bingo operation run by several people. During the original proceeding in this case, the critical issue during the Appellant's prosecution was the outcome of his motion to suppress evidence which the Government intended to use as evidence at trial. This evidence consisted of various books, records, papers and effects that the Government seized from Mr. Shelton's home by using Mr. Shelton's estranged wife and turned

government agent, Cheryl Wheeler, to remove those items or photocopy and photograph those items so that the Government could obtain these papers and records. Cheryl Wheeler no longer lived in Mr. Shelton's home but gathered evidence at the behest of the Government. This evidence was the lynchpin of both the prosecution of this case and Mr. Shelton's defense to the charges. The Magistrate Judge granted Shelton's motion to suppress after listening to live witness testimony during the suppression hearing. However, this decision was overturned by the District Court without any further testimony.

After the motion to suppress was denied Shelton pled to tax fraud because of the evidence seized from the marital home and delivered to authorities by his estranged wife. After the Fifth Circuit affirmed his conviction, reported as *United States v. Shelton,* 337 F.3d 529 (5th Cir. 2003), a motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence under the grounds that, in part, the evidence seized by Cheryl Wheeler was a warrantless permanent seizure. The District Court denied Shelton's Section 2255 petition, but issued a Certificate of Appealability, with the specific issue being: whether, under the facts of this case, the *seizure* of evidence from the Petitioner's home by his estranged wife, who was a government agent, violated the Fourth Amendment prohibition against unreasonable searches and seizures. The District Court, in its memorandum opinion, listed several reasons in granting its Certificate of Appealability; i.e. "*There appears to be*

no authority directly on point regarding this issue, whether binding or merely persuasive." District Court Memorandum Opinion, page 5. *He (Shelton) has cobbled together the holdings from several cases to support this argument, and if the cases had meshed better, he might have won the day.* District Court Memorandum Opinion, page 5. Additionally, in referencing *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984), the District Court stated *"that inquiry entails the weighing of various factors and is not before us. . . . the Court did not, however, set forth the various factors to consider when determining whether a seizure is reasonable. Indeed, it appears that no court has determined the factors to consider in this situation.* District Court Memorandum Opinion, page 9. Lastly, the Court stated that *"The Court can find no case, however, setting forth a test to determine the reasonableness of a seizure in isolation from a search.* District Court Memorandum Opinion, page 9. It is clear from the above referenced language, the District Court had asked that the Fifth Circuit provide clarity to the issue of seizure as it relates to the case at bar. Noting that the Fifth Circuit has failed to answer pivotal questions involving the application of the Fourth Amendment to the United States Constitution, Petitioner Shelton asks that the United States Supreme Court consider his argument that he can show that the permanent seizure did cause conceivable prejudice to his criminal case.

REASONS FOR GRANTING THE PETITION

Introduction

It is not unrealistic to describe this case as being at the intersection of four extremely significant lines of well established Fourth Amendment law. These are: (1) the line created *Burdeaeu v. McDowell,* 256 U.S. 465 (1921), the case that clarified the rule that the Fourth Amendment is a limitation of Government action only; (2) the line represented by *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), in which the Court articulated the standards for determining when a person's consent to a search is voluntary; (3) the line of cases describing the "third party" consent doctrine, (most recently discussed by the Court in *Illinois v. Rodriguez,* 497 U.S. 177 (1990)); and (4) the broad line of authority created by *Katz v. United States,* 389 U.S. 347 (1967), the holding that gave rise to the concept that "the Fourth Amendment protects people, not places," together with *Katz's* attendant limitation that the Amendment protects only those subjective expectations of privacy that society is prepared to recognize as reasonable. Remarkably, in *Shelton* the Court of Appeals reached a result that is at odds with this Court's holdings in all four areas – primarily because the Court of Appeals began with the flawed premise that the Fourth Amendment does not apply to government action if that action is undertaken in a dual capacity, *i.e.,* if the government agent conducting the search has, or has been given the right, as a private citizen, to be where he or she is. Thus, because the Court of Appeals ignored the *Burdeau*

rule – although it was undisputed that Cheryl Wheeler was acting as a government agent – it was then constrained to conduct an analysis of "consent" that never addressed the very basic question of whether a government agent can validly "consent" to a search of the property of a third party that the agent herself is conducting for the government that employs her.

Moreover, the Fifth Circuit Court of Appeals relied upon the flawed opinion that a warrantless seizure of documents was legal even though no search within the meaning of the Fourth Amendment took place. Additionally, the Fifth Circuit Court of Appeals, along with the United States District Court for the Northern District of Mississippi incorrectly held that the defendant did not suffer prejudice, therefore, no Fourth Amendment violation occurred. In short, this case raises several important, unresolved Fourth Amendment issues, making review by this Court appropriate.

I. WHETHER IT IS ILLEGAL FOR THE GOVERNMENT TO PERMANENTLY SEIZE EVIDENCE FROM A DEFENDANT'S HOME WITHOUT A WARRANT WHEN THE ACTUAL SEARCH OF THE DEFENDANT'S HOME WAS LEGAL?

The issue in this case is whether the warrantless seizure of various papers and documents belonging to Jimmy Doug Shelton was unconstitutional. This question presented requires a very careful and

structured analysis of the Fourth Amendment, and the two different protections afforded under the Amendment. The Fourth Amendment protects two different expectations of citizens from government action, one involving "searches" and the other "seizures." *Soldal v. Cook County, Illinois*, 506 U.S. 56, 68 (1992).

> The Fourth Amendment requires that the
>
> right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States v. Richards, 994 F.2d 244, 247 (5th Cir. 1993).

The first inquiry in any search and seizure case (where there is no warrant for the search and seizure) is whether an unconstitutional search has taken place. The Fifth Circuit has established a two-step analysis for determining whether an unconstitutional "search" has taken place when no warrant was obtained by the police. First, the court considers whether the activity intrudes upon a reasonable expectation of privacy in such a significant way to make the activity a "search." Then, if the court finds a "search" has occurred, the court determines whether the governmental intrusion was unreasonable given

the particular facts of the case. *United States v. York*, 895 F.2d 1026, 1028 (5th Cir. 1990).

In Mr. Shelton's case the legality of the "search" of his home has been litigated. This brief focuses on the second step in the analysis that must be made in any warrantless search and seizure case and which Mr. Shelton's counsel failed to litigate in this case; *i.e.*, whether the warrantless seizure of Mr. Shelton's books, papers and other personal property was unconstitutional. This inquiry – which has never been litigated in this case – is required because both the Fifth Circuit and the United States Supreme Court have specifically held that in addition to the question of whether the initial search was constitutional:

> A governmental "seizure" of property – that is, some meaningful interference with an individual's possessory interest in that property, *United States v. Jacobsen*, 466 U.S. 109 (1984) – is subject to Fourth Amendment scrutiny even if no search within the meaning of the Amendment takes place.

Soldal v. Cook County, Illinois, 506 U.S. 56, 68 (1992); *United States v. Padilla*, 508 U.S. 77 (1993) (to challenge a seizure the defendant need only establish that the seizure interfered with her or her constitutionally protected possessory interests in property); *see also*, *United States v. Paige*, 136 F.3d 1012 (5th Cir. 1998); *United States v. Wilson*, 36 F.3d 1298 (5th Cir. 1994).

It is critical to an analysis of Petitioner's claims in this case that this distinction be remembered at all times for the reason that well known legal principles, while true and correct as to a "search" case, have no application to an analysis of a warrantless "seizure." As will be demonstrated below, if a structured and step by step analysis is made to the "seizure" claims in this case, it is clear that the seizure of Petitioner's papers, books, and effects was unconstitutional.

During the original proceeding in this case, the critical issue during the Petitioner's prosecution was the outcome of his motion to suppress evidence which the Government intended to use as evidence at trial. This evidence consisted of various books, records, papers and effects that the Government seized from Mr. Shelton's home by using Mr. Shelton's estranged wife and turned government agent, Cheryl Wheeler, to remove those items or photocopy and photograph those items so that the Government could obtain these papers and records. Cheryl Wheeler no longer lived in Mr. Shelton's home but gathered evidence at the behest of the Government. Petitioner respectfully argues that the warrantless seizure of various papers and documents belonging to Jimmy Doug Shelton was unconstitutional. This is the second part of a two-part analysis of search and seizure cases. The first part of the test has already been litigated, and this issue requires a careful analysis of the Fourth Amendment and the protections afforded under the Amendment. This argument focuses on the "seizure," rather than the "search," and the legal principles that

the Government accurately applies to the "search" case have no application to the "seizure" analysis.

A governmental "seizure" of property – that is, some meaningful interference with an individual's possessory interest in that property, *United States v. Jacobsen,* 466 U.S. 109 (1984) is subject to Fourth Amendment scrutiny even if no search within the meaning of the Amendment takes place. *Jacobsen* did not suggest that a defendant need be prejudiced by the seizure for a Fourth Amendment violation to exist. Nonetheless, the Petitioner suffered prejudice by the permanently seized evidence by the government resulting in his plea to aiding or assisting in the filing of a false tax return for the bingo operation. Without the seized evidence, the Petitioner would have proceeded to trial.

Likewise, in *Soldal v. Cook County, Illinois,* 113 S.Ct. 1652 (1992) the Supreme Court did not suggest that in order for a seizure to be illegal, overt prejudice must exist. The mere possibility that illegally seized evidence could have been used during trial, can lead a defendant to enter a plea when he otherwise would not. The United States Supreme Court has explicitly held that "a governmental 'permanent seizure' of property without a warrant is illegal. The Fifth Circuit has already decided that although temporary seizures of property can be made without a warrant provided that certain circumstances were met, that *Jacobsen* does not apply to permanent seizures made without a warrant. *See United States v. Paige,* 136 F.3d 1012 (5th Cir. 1998). Petitioner Shelton asks

that this Court carefully review the facts in this case as compared to the previous decision in *Paige* and the many Supreme Court decisions that support his position. The *Paige* court specifically held that even though the Fourth Amendment had not been violated by the search; the subsequent permanent seizure was unconstitutional unless a separate exception to the warrant requirement exists. Nonetheless, the Fifth Circuit Court of Appeals affirmed Shelton's conviction although the same circumstances that existed in *Paige*, are even more distinctive in Shelton's case.

Government agent and estranged wife Cheryl Wheeler had no possessory interest in any real or personal property located within the house. She testified unequivocally that she did not:

> ***Q. I want to ask you about the notepad.***
>
> ***A. Okay.***
>
> ***Q. They specifically wanted to see some of that?***
>
> ***A. Correct.***
>
> ***Q. Wait. I want you to focus on that.***
>
> ***A. Okay.***
>
> ***Q. Because you didn't just happen to look at a 10-foot grandfather clock at the top of it. Do you normally, when you go to your house every day, check the top of a grandfather clock?***
>
> ***A. No. Jimmy does, but <u>I don't.</u>***

Q. But that's Jimmy.

A. Right.

Q. That's because it's his; right?

A. That's correct.

(Motion Hearing Transcripts, October 29, 2001, Volume I, Record on Appeal).

Petitioner Shelton, therefore, can challenge the seizure because he can establish that the seizure interfered with his constitutionally protected possessory interest in his property. *United States v. Padilla*, 508 U.S. 77 (1993). Furthermore, Shelton can assert this challenge because the permanent seizure of the evidence cannot be justified under the "plain view" doctrine. Since his estranged wife and government agent Cheryl Wheeler did not have common authority or control over the evidence seized, its seizure is unconstitutional. Cheryl Wheeler was not living in the house and stated that she had permanently left the household and the marriage, i.e. "never to return". In further support of the Mr. Shelton's *Paige* analysis, the *Paige* Court specifically noted: "as such, *Jacobsen,* which evaluated the reasonableness of an officer's warrantless, temporary seizure of a package, is distinguishable on its facts, *and we refuse to apply it to the permanent seizure executed in this case.*" *Paige,* 136 F.3d at 1022-1023. Government agents could have complied with *Jacobsen* and *Paige* by obtaining a search warrant to justify the permanent seizure of the property after having temporarily obtaining it. In clear violation of Shelton's Fourth

Amendment protections, the agents did not. Did this permanent seizure prejudice Shelton? Absolutely. The evidence, and potential use during trial was the primary reason that the defendant entered into a conditional guilty plea. Absent the permanent seizure, Shelton would have proceeded to trial without the possibility of the Government using the critical pages of evidence that were illegally seized by the Government. The Government's permanent seizure of his personal belongings is the primary reason that Mr. Shelton entered into a plea agreement. Certainly he suffered prejudice by the very possibility that the notepad that exclusively belonged to him would have been a vital piece of evidence in his prosecution during trial. The magistrate judge determined through his observation and learned reasoning during the suppression hearing that Shelton's Fourth Amendment rights were violated. A district court's ruling on a motion to suppress based upon live testimony at a suppression hearing is accepted unless clearly erroneous or influenced by an incorrect view of the law. *United States v. Wilson,* 36 F.3d 1298, 1303 (5th Cir. 1994).

Although the pages from the notepad are an important part of the Petitioner's claim, he also submits that when the Government unlawfully seized papers, copied those papers, that this conduct constituted a permanent seizure as it relates to the Fourth Amendment. Mr. Shelton's possessory interest in his personal property is at stake. *See Soldal v. Cook County, Illinois,* 506 U.S. 56, 68 (1996). Can a

member of this panel dispute that if someone unlawfully took their diary, or personal journal, copied the document and subsequently returned the document to the panel member's home, that a permanent seizure of the document had not been made? Certainly not. Likewise, Mr. Shelton's possessory interest has been compromised by the illegal copying of documents that were solely in his possession.

Although sparsely scattered, a few cases discuss the issue of an estranged wife seizing evidence belonging to her estranged husband. However, there is absolutely no case which discusses an estranged wife who also serves as a government agent permitting a search and permanent seizure of evidence. In *United States v. Backus*, 349 F.3d 1298 (11th Cir. 2003), the Eleventh Circuit discussed whether "consent of an estranged wife who still *jointly owns* the marital home with the defendant, but who has not been in that home in some time, is, in effect, against the defendant. In *Backus* the wife had been subjected to years of physical abuse and threats which ultimately forced her to flee the marital home. However, in distinguishing *Backus* from the case at bar, Shelton did not physically abuse his wife nor did she flee the marital home. She left on her own volition "*never to return*" on an assumption of infidelity. Equally as important, the Petitioner's wife did not jointly own the home with the defendant, her name was not on the deed and had relinquished personal property that she maintained. It is undisputed that she never possessed any interest in the marital home since the defendant owned the

home several years prior to entering into a marriage with her. As the *Backus* court stated, "There is a difference between voluntarily giving up your home and being forced to flee from it in fear for your life and the life of your child. Cheryl Wheeler voluntarily gave up the marital domicile and did not possess any other interest she had in property located therein.

In *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), the Fifth Circuit Court of Appeals reversed a decision by a lower court and determined that *Runyan* had a possessory interest in the materials searched. Like *Runyan*, the record in *Shelton* indicates that the Petitioner took normal precautions to maintain his privacy with respect to materials seized. By placing his personal documents on the top of a 10-foot clock that Cheryl Wheeler testified that she never retrieved, is indicative of Mr. Shelton's efforts to secure the notepad from intrusion. *See United States v. Vega*, 221 F.3d 789 (5th Cir. 2000) (indicating that relevant factors when evaluating "normal precautions to maintain privacy" include whether the searched area is fenced or railed, whether the searched area was locked, and whether strangers were invited into the searched area).

Typically assets acquired during the marriage are considered marital assets and assets acquired before the marriage are considered non-marital assets. Only marital assets are subject to equitable distribution. *Hemsley v. Hemsley,* 639 So. 2d 909, 915 (Miss. 1994). Unquestionably the home belonged to Mr. Shelton. Cheryl Wheeler did not have any possessory

interest in the home or contents therein and could not permanently seize documents contained within the home. The District Court, in its Memorandum Opinion denying relief under 28 U.S.C. § 2255, stated that "in the present case, however, Cheryl Wheeler was as closely bound to the defendant as the court can conceive. She was married to him and she was engaged in a complex criminal enterprise with him." However, the actual facts do not support this statement. Cheryl Wheeler had moved out of the marital home "never to return." (Motion Hearing Transcripts, Volume I page 143 at 8-15). Her entries into the home were not known by the defendant and she covertly entered the home as directed by the government.

Just because a search is deemed to be constitutional does not mean that any subsequent seizure was constitutional. Through the exposition of well-established and delineated case law, this Court has shown it is a fundamental principle that a permanent seizure of property without a warrant is prohibited even when the defendant's expectation of privacy in the property at issue has been completely extinguished. Although fundamentally true, this could be subject to a couple of exceptions, neither of which apply to Mr. Shelton.

One possible exception to this principle is that Mr. Shelton or someone with the proper authority gave consent to the seizure. The Fifth Circuit has ruled that Cheryl Wheeler could and did give consent to search the home, but this consent does not go as

far as covering the seizure. Cheryl Wheeler did not have a possessory interest in the property in question and did not have the authority to consent to such a seizure.

The Government argues that the subsequent search warrant issued for Mr. Shelton's home adequately saves the warrantless seizure. This argument is without merit because the Government never sought nor obtained a warrant authorizing the Government to keep the items Cheryl turned over to the Government and which the Government later used to prosecute Mr. Shelton.

Another possible exception is the so-called "plain view" exception. This exception does not apply to Mr. Shelton's case for a number of reasons. First and foremost, the "plain view" argument in this case is a pretext. Cheryl Wheeler was clearly sent into the house by government agents to retrieve some specific items, which fundamentally establishes that the "plain view" doctrine does not apply. According to well-established case law, the "plain view" exception only applies when the location and nature of the property in question are known beforehand. Thus, the "plain view" argument is clearly and simply a pretext to justify the warrantless seizure of property.

Furthermore, the evidence was not in "plain view," as required by law for the exception to apply. One of the most important items seized by Cheryl Wheeler was a notebook that was unquestionably NOT in "plain view". First, the notebook was on the

top of a 6-foot, 10-inch grandfather clock. Second, the contents of the notebook were not in "plain view" because the notebook was closed. These conditions do not satisfy "plain view" as explained by well-established case law.

II. THE OPINION OF THE FIFTH CIRCUIT IS CONTRARY TO THE PRECEDENT OF THIS COURT IN AT LEAST THREE REGARDS

This Court's decision in *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) is normally cited for the proposition that the "[Fourth Amendment] was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . . ." It is equally true, however, that *Burdeau* reaffirms the principle that when there *is* governmental action, the Fourth Amendment cannot be disregarded:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as Shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority, it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession

> of his property, subject to the right of seizure by process duly issued.

Burdeau, supra, p. 475.

Since *Burdeau*, this Court has with some regularity addressed the question of when one is acting as a government agent for purposes of the Fourth Amendment. *See Lustig v. United States,* 338 U.S. 74 (1949); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Walter v. United States,* 447 U.S. 649 (1980); *United States v. Jacobsen,* 466 U.S. 107 (1984); and *Arizona v. Evans,* 514 U.S. 1 (1995). All of these cases have at least one thing in common: each reaffirms the principle that when government acts are involved, the actors are bound by the Fourth Amendment. At no time has this Court ever even hinted that the Fourth Amendment becomes inapplicable when one is conducting a search (or a seizure) wearing two hats, *i.e.,* as a private citizen with limited access to be there, and as a government agent, with no independent right to be there.

To the contrary, in *Coolidge v. New Hampshire,* 403 U.S. 443, 487 (1971), the Court made it clear that when one is acting as a government agent – even if one has the right to be there as a private citizen – the test is whether the *Government* has the right to be there:

> The first branch of the petitioner's argument is that when Mrs. Coolidge brought out the guns and clothing and then handed them over to the police, she was acting as an

"instrument" of the officials, complying with a "demand" made by them. Consequently, it is argued, Coolidge was the victim of a search and seizure within the constitutional meaning of those terms. Since we cannot accept this interpretation of the facts, we need not consider the petitioner's further argument that Mrs. Coolidge could not or did not "waive" her husband's constitutional protection against unreasonable searches and seizures.

Had Mrs. Coolidge, **wholly on her own initiative,** sought out her husband's guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence.

Cf. Burdeau v. McDowell, 256 U.S. 465.

The question presented here is whether the conduct of the police officers at the Coolidge house was such as to make her actions their actions for purposes of the Fourth and Fourteenth Amendments and their attendant exclusionary rules.

The test, as the petitioner's argument suggests, is whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state

> **when she produced her husband's belongings.**

(emphasis added, citations omitted). One need only substitute the name of Cheryl Wheeler for that of Mrs. Coolidge to place the error of the Court of Appeals in focus: the *government's* right to search is not measured by what a private party has done, or might do.

The mistake made by the Court of Appeals is the one Justices White and Brennan warned against, in their concurring opinion in *Walter v. United States,* 447 U.S. 649, 660 (1980):

> I agree with Mr. Justice STEVENS that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party. (footnote omitted). I write separately, however, because I disagree with Mr. Justice STEVENS' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government, *ante,* at 657, n. 9. **The notion that private searches insulate from Fourth Amendment scrutiny subsequent government searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.**

Walter v. United States, supra (emphasis added).

The clear language of this Court's cases indicate that just because you can do it as a private citizen, does not lend permission for one to do it as a government agent.

As indicated by the statement from Justices White and Brennan, above, such an approach to the Fourth Amendment as used in the case at bar. is just wrong. Although a private citizen still has the "right to engage in conduct which was authorized prior to entering the agency relationship," that right is held by the citizen, not by the government. It is neither transferable to the government, nor does it "insulate" the government from Fourth Amendment scrutiny. The Fifth Circuits approach to this basic aspect of Fourth Amendment law should be reviewed by this Court.

A. The Government cannot give itself permission or consent to conduct searches and seizures.

As is made plain by the opinions of this Court, any assessment of the validity of a third party's consent to search property owned or occupied or under the control of another must look to two things: whether the third party's consent was lawfully obtained by law enforcement; and whether the third party had the authority to consent. *United States v. Matlock,* 415 U.S. 164, 170-171 (1974). The first inquiry is conducted by looking to the factors described in *Schneckloth v. Bustamonte,* 412 U.S. 218

(1973); the second, by looking to the factors set out in *Illinois v. Rodriguez,* 497 U.S. 177 (1990).

In this case, the Court of Appeals never considered the question of whether Cheryl Wheeler's "consent" to the searches and seizures was *voluntary.* In fact, it could not do so, because conducting the type of analysis called for by *Schneckloth v. Bustamonte, supra,* borders on the absurd when the person from whom consent is being obtained is an agent of the entity seeking consent. In such instances, consent is a foregone conclusion. Implicit in most agency relationships – and certainly in all "agency relationships" in which the person giving consent is also seeking immunity from prosecution – is precisely the type of coercion this Court warned against in *Schneckloth v. Bustamonte:*

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more that a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Schneckloth v. Bustamonte, supra, p. 228.

There is no holding of this Court that could be invoked to support a holding that an agent of the government can consent to the search of a third-party's property, regardless of the agent's relationship to or with the third party. In fact, there is no court in

the United States that has so held – except the Fifth Circuit. In short, the opinion of the Fifth Circuit in this case disregards every one of this Court's opinions on the question of "voluntariness," and therefore should be reviewed.

CONCLUSION

In a word, this case comes down to "prejudice." It is true that the permanent seizure of Mr. Shelton's papers crippled his potential defense at trial. In limiting his estranged wife's access to his home, Mr. Shelton certainly did not assume the risk that this person, acting as an agent for the Government, would permanently seize his personal property that was not in "plain view" and in which his estranged wife had no possessory interest. Had Cheryl Wheeler not been a government agent, she would have been guilty of theft. But because she was an agent, she was *certainly* guilty of violating the Fourth Amendment. In the words of the Supreme Court in *Hoffa*:

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. *Hoffa v. United States,* 385 U.S. 301 (1966).

Petitioner requests that the Court set aside his conviction and sentence on the grounds that the permanent seizure of evidence from his home violates his

constitutional safeguards as articulated within the Fourth Amendment.

This the 9th day of December, 2009.

Respectfully submitted,

JIMMY DOUG SHELTON
Pro Se Petitioner
218 N. Spring Street
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60943
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JIMMY DOUG SHELTON

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:05-CV-30 USDC No. 1:00-CR-127-1

(Filed Jun. 30, 2009)

Before HIGGINBOTHAM, BARKSDALE, and ELROD, Circuit Judges. PER CURIAM:*

Jimmy Doug Shelton pled to tax fraud largely because of evidence obtained from the marital home

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and delivered to authorities by his estranged wife Cheryl. She no longer lived in the residence but retained access to it with Jimmy's knowledge and acquiescence.[1] Shelton conditioned his guilty plea on a reserved right to appeal the district court's denial of his motion to suppress the evidence that she removed from the marital residence and given to law enforcement officials. When Shelton appealed, we affirmed the district court's denial of the motion to suppress on the grounds that Cheryl had "common authority to consent to the government's search, i.e., to remove the bingo operation materials from Shelton's house and deliver them to the government.[2] Apparently, all but two notebook pages out of all these materials were copied or photographed and were returned; the two pages were apparently retained by the government.

Shelton now essentially argues that the two pages where he kept records of his illegal activity were permanently "seized" contrary to the Fourth Amendment, and that the "intellectual property" of the rest of the papers was also unconstitutionally seized. This 28 U.S.C. § 2255 motion argues that counsel at the trial and appellate levels provided ineffective assistance by failing to challenge this "permanent seizure" of the evidence that was removed from his home by Cheryl. The district court denied relief,

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[1] The facts concerning Cheryl's conduct, which are not in dispute are provided in our opinion on direct appeal. *See U.S. v. Shelton*, 337 F. 3d 529. 530-31 (5th Cir. 2003).

[2] *Shelton*, 337 F. 3d at 538.

holding that the seizure was reasonable based on similar grounds that the search was reasonable. Nevertheless, the district court granted a certificate of appealability as to "[w]hether . . . the *seizure* of evidence . . . violated the Fourth Amendment prohibition against unreasonable searches and seizures."

Shelton contends that the government's permanent seizure of the evidence removed from his home by Cheryl was unconstitutional and thus counsel performed ineffectively by challenging only the *search*. He contends that no exception to the warrant requirement applies for this seizure and that the nature of the evidence precludes application of the plain view doctrine; he argues that even if a *temporary* seizure of the property was constitutional – which our decision on direct appeal has already settled[3] – the *permanent* seizure without a warrant was unconstitutional and if properly raised would have led to suppression at trial.

Shelton's ineffective assistance arguments regarding trial and appellate counsel are governed by *Strickland*.[4] Shelton must show that counsel's performance was deficient and that the deficient

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[3] It might well settle the permanent seizure issue, too. It concluded: "[T]oday we hold that Cheryl possessed common authority to consent to the government's search, i.e., to remove the bingo operation materials from Shelton's house and deliver them to the government. . . ." *Id.* at 538.

[4] *Blanton v. Quarterman*, 543 F.3d 230, 235 (5th Cir. 2008).

performance prejudiced the defense.[5] This he does not and clearly cannot do. Even assuming that the seizure has not already been fully litigated (search and seizure inquiries are often collapsed in cases where the analytical distinction is immaterial), and even assuming the evidence could only be *temporarily* and not *permanently* seized by the government in this case without a warrant – i.e., that Cheryl could not consent to *permanent* seizure even though we have held she could certainly consent to temporary seizure – Shelton cannot show that the permanent as opposed to the temporary seizure caused any conceivable prejudice to his criminal case. The notion that the evidence would have been suppressed is fanciful. Our previous opinion made clear that the search for and the temporary seizure of the documents was legal; that is, the government could lawfully read and use these documents for its investigative and prosecutorial purposes, which surely includes photocopying them. No "intellectual property" interest could be thereby infringed – the government did not debase the value of any intellectual property in these documents. As to the two notebook pages, absent unusual circumstances, evidence against a defendant lawfully obtained by the government can be lawfully retained for a criminal prosecution.[6]

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[5] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[6] The facts of countless cases establish this proposition. *See, e.g., U.S. v. Smith*, 930 F.2d 1081, 1084 (5th Cir. 1991) ("An officer obtained Shyane Smith's written consent to search the premises. Pursuant to this search, the officers seized a file

(Continued on following page)

Retaining documents tending to demonstrate Shelton's guilt was not an unreasonable seizure by the government. Trial or appellate counsel urging Shelton's preservation of some underlying ownership in the relevant papers would not have had any effect on his conviction.

We AFFIRM.

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containing various papers, including telephone bills for March and April at that address bearing the defendant's name. The officers also seized sexually explicit photos of the defendant.").

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60943
Summary Calendar

D.C. Docket No. 3:05-CV-30
D.C. Docket No. 1:00-CR-127-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JIMMY DOUG SHELTON,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

Before HIGGINBOTHAM, BARKSDALE, and ELROD, Circuit Judges.

JUDGMENT

(Filed Jun. 30, 2009)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: 18 SEP 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
EASTERN DIVISION

JIMMY DOUG SHELTON **MOVANT**

v. **No. 1:00CR127-P-D**

UNITED STATES OF AMERICA **RESPONDENT**

MEMORANDUM OPINION

(Filed Nov. 16, 2007)

This matter comes before the court on the motion of Jimmy Doug Shelton to vacate, set aside, or correct the sentence imposed under the court's April 17, 2002, judgment. In that judgment, the movant pled guilty to the charges contained in Count 49 of the superseding indictment – submitting false tax returns under 26 U.S.C. § 7206A. The government has responded to the motion, and the movant has replied. The movant submitted an amendment to the petition, and the government objected to the amendment. That objection shall be overruled, and the court shall consider all claims raised by the movant. The matter is ripe for resolution. For the reasons set forth below, the instant motion to vacate, set aside, or correct Shelton's sentence shall be denied.

Facts and Procedural Posture

The movant, Jimmy Doug Shelton ("Shelton"), was charged in a fifty-count indictment with various

crimes arising out of a bingo operation Shelton ran with others. Shelton and others were taking money from the proceeds of the charity bingo game and transferring it, through various channels, to themselves. Under a conditional plea agreement, Shelton pled guilty to Count 49 of the superseding indictment, filing false tax returns under 26 U.S.C. § 7206A, and the remaining counts were dismissed. Under the plea agreement, Shelton reserved the right to appeal the search and seizure of evidence from his home, as discussed below.

Shelton was indicted in this case after his estranged wife, Cheryl Shelton ("Cheryl"), searched their marital home, took various papers and effects, and copied papers and records. These items were located inside Shelton's home in Tupelo, Mississippi. Cheryl, who was no longer living in the Movant's home, acted as a paid informant for the government. At the government's request, Cheryl entered Shelton's home in 1997 on May 10, May 22, May 29, July 22, July 31, August 1, August 6, August 7, and August 8, in order to search, photocopy, photograph and remove the papers and records regarding the bingo operation – then to provide those records, photocopies, and photographs of the records, to the government.

The evidence Cheryl Shelton recovered was the foundation of the government's case, and the suppression of this evidence was critical to Jimmy Doug Shelton's defense. His trial counsel filed a motion to suppress the evidence – based on the premise that

Cheryl did not have authority to consent to a search of the home – and thus that the evidence the government obtained as a result of Cheryl's activities was the result of an illegal search of the home. Jimmy Doug Shelton's trial and appellate counsel contested the evidence solely on the basis that the *search* of Shelton's home was illegal. Thus, both the district court opinion, and the Fifth Circuit opinion, *U.S. v. Shelton,* 337 F.3d 529 (5th Cir. 2003), discuss only the legality of the *search* in this case.

The district court opinion denying Jimmy Doug Shelton's motion to suppress – and the Fifth Circuit opinion affirming that decision – were based on the finding that Cheryl Shelton had authority to give third party consent to the search of Shelton's home. As Cheryl Shelton had access to the residence – which had been the marital home before her suspicions regarding her husband's infidelity – Jimmy Doug Shelton had no reasonable expectation of privacy of its contents. As such, Cheryl Shelton could give consent to search the home. This was the only issue raised by Jimmy Doug Shelton's counsel on appeal.

Jimmy Doug Shelton's Claims Under 28 U.S.C. § 2255

Jimmy Doug Shelton frames his claims in this case in terms of ineffective assistance of counsel. He alleges:

1. That trial counsel was ineffective for failing to challenge Cheryl Shelton's *seizure* of evidence from his home.

2. That appellate counsel was ineffective for failing to challenge Cheryl Shelton's *seizure* of evidence from his home.

3. That appellate counsel was ineffective for conceding facts during oral argument that were not true, namely, that Jimmy Doug Shelton invited Cheryl Shelton to the home to alter charity bingo records.

The movant has also moved to add a fourth claim to the instant motion to vacate, set aside, or correct his sentence, a claim:

> [That his] rights under the Fourth Amendment to be protected against [unreasonable] searches and seizures were violated when the district court and the Court of Appeals found that [his] estranged wife, who had been given limited *access* to movant's house, but nothing more, had the right to search the house, and seize evidence, while acting as a government agent.

This additional claim is merely a restatement of the substantive claim underlying the movant's first two grounds. The government has opposed this amendment, arguing that permitting it would rob the government of its statute of limitations defense. The court finds, however, that the movant has not presented any new claims in this proposed ground for relief. Instead, he simply presents a different twist on

the arguments and facts set forth in Grounds One and Two. In any event, the government has responded, and the court shall consider the new arguments and the government's response in its decision.

Ineffective Assistance of Counsel

To establish that counsel provided ineffective assistance, a movant under 28 U.S.C. § 2255 must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Pitts v. Anderson,* 122 F.3d 275 (1997); *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The court must presume that counsel's conduct was reasonable; in other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland,* 466 U.S. at 689. The court must not analyze counsel's actions with the crystal clarity of hindsight; instead, the court must view counsel's actions using the information reasonably available to counsel at the time of the representation. *Motley v. Collins,* 18 F.3d 1223, 1226 (5th Cir. 1994). Should the court determine that counsel's performance was deficient, "then [the court] must determine whether there exists a reasonable probability that but for the complained-of error the outcome of the trial or appeal would have been different." 172 F.3d at 275 (quoting *Sharp v. Johnson,* 107 F.3d 282, 286 n.9 (5th Cir. 1997)). As discussed below, counsel's actions were reasonable at trial and on direct appeal, and the movant's underlying claims are without merit. As

such, Jimmy Doug Shelton's claims that trial and appellate counsel were ineffective must be denied.

Cheryl's Seizure of Evidence in the Marital Home

Jimmy Doug Shelton concedes that the issue of the legality of Cheryl's *search* of his home for evidence of his crime has been resolved by the Fifth Circuit in this case. Instead, he challenges the validity of Cheryl Shelton's *seizure* of evidence from the home. There appears to be no authority directly on point regarding this issue, whether binding or merely persuasive. As such, any rule applied to the facts of this case must be woven from the Fourth Amendment itself and holdings of factually similar cases. Unfortunately, neither Jimmy Doug Shelton nor the government has woven a complete and satisfactory argument in that regard.

Jimmy Doug Shelton's Faulty Analysis of the Seizure

Jimmy Doug Shelton argues that his trial and appellate counsel were ineffective in failing to challenge Cheryl's *seizure* of the evidence under the Fourth Amendment. He has cobbled together the holdings from several cases to support this argument, and if the cases had meshed better, he might have won the day. Unfortunately for Shelton, the fragments he attempts to assemble into a new rule of law arise out of factual scenarios distinguishable from the

case at hand, and, in the end, cannot stand together. He argues that the permanent[1] warrantless seizure of the papers and other evidence from his home violated the Fourth Amendment prohibition against unreasonable seizures, citing *United States v. Paige,* 136 F.3d 1012 (5th Cir.1998). In addition, he argues that a government's *seizure* of property (meaningful interference with an individual's possessory interest in that property) is subject to Fourth Amendment review, even if no Fourth Amendment search has taken place. *Soldal v. Cook County, Illinois,* 506 U.S. 56, 58 (1992). Examining these rules in a vacuum might lead to the conclusion that Cheryl Shelton's seizure of documents from her former marital home violated the Fourth Amendment, but a closer examination reveals that the *Paige* and *Soldal* cases have little bearing on the facts of this case.

Paige Relied on the Plain View Doctrine and Is Not Applicable to the Present Case

In *Paige,* the defendant hired workers to repair the roof of his home, which had a detached garage twenty to thirty feet away, but within the curtilage of the home. *Paige,* 136 F.3d at 1015. The defendant had told the workers that they should look in the garage "if [they] needed anything." *Id.* The workers accidentally damaged a section of the siding on the

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[1] The court assumes, without deciding, that at least some of the the seizures of evidence in this case were permanent.

defendants house, and one of them looked for extra siding in the garage. *Id.* He did not see any in the garage workroom or the carport area. *Id.* Upon further inspection, however, he noticed an attic opening and jumped, grabbed a rafter, and pulled himself up to see in the attic. *Id.* As he looked for siding material, he saw a scale and what he believed to be "some type of drugs." *Id.* He summoned the other worker, who also looked at the scale and packages. *Id.* The first worker then summoned his father, the owner of the roofing business (and an off-duty Deputy Sheriff) and told him he had "something for him to see." *Id.* His father arrived, retrieved a ladder, and looked at the scale and packages. *Id.* at 1015-1016. He also reached into an open white bag, retrieved green, leafy material, and smelled it. *Id.* at 1016. He recognized the smell of marijuana, told his workers to continue their roofing while he got help, and left the scene. *Id.*

Help came in the form of a narcotics investigator, who arrived, went directly to the garage, and used a ladder to view the packages – all without a warrant. *Id.* He, too, recognized the smell of marijuana, then sought out the defendant, Paige, who by this time had surmised that his garage had been searched. *Id.* at 1016. Paige said, "[Y]ou already know what it is . . . there's fifty pounds of marijuana up there." *Id.* Paige was then detained, received his *Miranda* warnings, and gave consent for the narcotics officer to search the house and other buildings on the property. *Id.* The narcotics officer photographed the packages of

marijuana in the garage attic, then seized the marijuana and carried it away. *Id.*

The Fifth Circuit found that the seizure of the marijuana by the narcotics officers was reasonable and justified under the plain view doctrine because the search by law enforcement officers extended no further than the one conducted initially by private citizens. *Paige,* 136 F.3d at 1024. When the narcotics officers looked into the garage attic from the same vantage point as the roofing employees, the marijuana was in plain view. *Id.* at 1016.

Paige is distinguishable from the present case in several crucial respects. First, the party giving consent to search in *Paige* was a roofer – related to the defendant only through the roofing contract. As such, he was an outsider who was permitted into the detached garage solely because of the contractual relationship with the defendant. Thus, as discussed below, the Fifth Circuit did not discuss the doctrine of assumption of the risk or whether the roofers had actual authority to consent to the seizure of marijuana. Instead, the Fifth Circuit relied upon the plain view doctrine, which is not applicable to the instant case.

In the present case, however, Cheryl Shelton was as closely bound to the defendant as the court can conceive. She was married to him, *and* she was engaged in a complex criminal enterprise with him. Further, she had unfettered access to the home and everything in it. As such, she had actual authority to

consent to the seizure of the evidence from the home. In addition, as discussed below, even if the court were to find that she lacked actual authority to consent to seizure of the evidence, the defendant assumed the risk that she might do so even without such authority. Thus, Cheryl Shelton's actual authority to consent to the seizure – and Jimmy Doug Shelton's assumption of the risk that she might do so – rendered the seizure of the evidence reasonable under a Fourth Amendment analysis.

Soldal Involved a Civil Dispute Where No Search Was Conducted

The *Soldal* case is likewise inapplicable. *Soldal* involved a bitter dispute between a trailer park manager and her tenant. *Soldal v. Cook County, Illinois,* 506 U.S. 56, 58 (1992). The manager had tried once, unsuccessfully, to evict the Soldals – and had initiated a second round of eviction proceedings for nonpayment of rent. *Id.* Two weeks before the scheduled hearing in the second eviction proceeding, the manager of the trailer park called the local sheriff's department and requested assistance in removing the Soldals' mobile home from the trailer park. *Id.* Once the deputy sheriffs arrived, trailer park employees wrenched the sewage connections free, disconnected the telephone wires, tore off the trailer's canopy and skirting, and hooked the mobile home to a tractor. *Id.* Soldal informed the deputies that the eviction matter was still pending – and that he wished to file a complaint against the trailer park manager and

owner for criminal trespass. *Id.* After conferring with the trailer park manager in the office for about thirty minutes – and after consulting a local prosecutor – the deputies told Soldal that the dispute was a private matter between landlord and tenant (a dubious statement considering that the state assisted the landlord only). *Id.* at 58-59. Soldal then watched as his home was dragged by a tractor into the street. *Id.* at 59. Later, the damaged home was towed to another lot. *Id.*

Both the district court and Seventh Circuit Court of Appeals (sitting *en banc*) – using the "reasonable expectation of privacy" analysis – found that the physical removal of the Soldals' home from its lot was *not* a seizure under the Fourth Amendment. *Id.* at 59-60. The Supreme Court, in a unanimous decision, reversed, holding that the seizure implicated the Fourth Amendment because the government (to say the least) had participated in a "meaningful interference with an individual's possessory interests in that property." *Soldal* 506 U.S. at 63 (citing *United States v. Jacobson,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984)). The Court also held, "Whether the Amendment was in fact violated is, of course, a different question that requires determining if the seizure was *reasonable.* That inquiry entails the weighing of *various factors* and is not before us." *Id.* (emphasis added). The Court did not, however, set forth the "various factors" to consider when determining whether a seizure is reasonable. Indeed, it

appears that no court has determined the factors to consider in this situation.

Soldal has only limited application to the instant case. Just as in *Paige,* the manager (who orchestrated the seizure) was a third-party outsider with only a contractual relationship to the Soldals. In the present case, Cheryl Shelton (who seized the evidence used against the defendant) was married to the defendant and engaged in a criminal enterprise with him. She obviously consented to the seizure, as she herself seized the evidence. The question thus becomes, "Was that seizure reasonable?" The overwhelming majority of cases dealing with Fourth Amendment searches and seizures focus on the propriety of the *search* of the premises – discussing the defendant's expectation of privacy or lack thereof. The court can find no case, however, setting forth a *test* to determine the reasonableness of a seizure in isolation from a search. The *Soldal* case holds only that a seizure under the Fourth Amendment can occur even absent a search; it does not set forth a test for analyzing the *validity* of such a seizure. Thus, Jimmy Doug Shelton's reliance on *Paige* and *Soldal* is misplaced. As discussed below, the court shall examine the totality of the circumstances to determine whether Cheryl Shelton's seizure of items from her former marital residence was reasonable.

The Government's Faulty Analysis of the Seizure

The government's argument is likewise flawed and thus cannot prevail as government has mischaracterized Jimmy Doug Shelton's claim. In its response to Shelton's motion, the government restates Shelton's argument thus:

> [Shelton] claims now, in his § 2255 motion, that *the Government's acceptance of the evidence* was an illegal warrantless seizure, and his counsel was deficient in failing to challenge it.

Government's Response to the Motion to Vacate, Set Aside, or Correct Sentence, p. 2 (emphasis added). This restatement of Shelton's claim is not accurate. Shelton does not claim merely that the government's *acceptance* of the evidence was an illegal seizure; instead, he claims that the government's *use of Cheryl Shelton (an agent of the government) to* ***obtain*** *the evidence* violated the Fourth Amendment. The government's characterization places the time of the seizure at the point when Cheryl Shelton presented the evidence to other government agents. Thus, the government argues, those other agents could use the plain view doctrine to seize the evidence. Using the correct characterization of Shelton's argument, however, the seizure occurred when Cheryl Shelton, an agent of the government, picked up the evidence *inside the premises – Jimmy Doug Shelton's home.* As the *other* government agents *outside the home* could not see the evidence until Cheryl Shelton had already

seized it and delivered it to them, the government's plain view argument cannot prevail. In addition, Cheryl Shelton had to remove the evidence she seized inside the home from locations not plain view. As such, this exception to the warrant requirement does not apply to her seizure. Thus, neither the government nor Jimmy Doug Shelton present argument reflecting the law on this issue.

Resolution of the Propriety of the Seizure of Evidence

A dilemma left unresolved under the authority cited by the parties is whether a spouse can have sufficient authority to consent to a search of the premises – yet have insufficient authority to consent to the seizure of evidence therefrom. The court concludes that such a situation is *theoretically* possible – but has not arisen under the facts of this case. As discussed below, the court finds that Cheryl Shelton had sufficient authority to seize the evidence in question and provide it to the government without a warrant. In addition, even if the court were to find that Cheryl Shelton did not have sufficient authority to seize the evidence without a warrant, Jimmy Doug Shelton assumed the risk that she would nonetheless do so, and the seizure was thus reasonable.

Jimmy Doug Shelton argues that the warrantless seizure of the papers from his home is presumptively unconstitutional unless it falls within one of the widely recognized exceptions to the warrant requirement, *e.g.*,

exigent circumstances[2], consent[3], plain view[4], national security[5], inventory search[6], or inevitable discovery[7]. The exception at issue in this case is consent – Cheryl Shelton's power to give the government permission to search the Jimmy Doug Shelton home – and permission to seize the evidence used against her husband. A fact complicating the court's analysis of this issue is Cheryl Shelton's decision to move out of the marital home after discovering evidence that her husband had been unfaithful to her. Had Cheryl Shelton remained in the marital home, she would clearly have had complete custody and control of the home and its contents and thus could have given valid consent to search and seize anything in the home and provide it to the government. *Matlock v. United States,* 415 U.S. 164, 171, n.7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (mutual use of property, or joint access or control of it is generally sufficient). In this case, however, Cheryl Shelton had moved out of the marital home and moved in with her sister. She retained a key to the home, as well as the security

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[2] *Payton v. New York,* 445 U.S. 573, 589, 100 S.Ct. 1371, 1381, 63 L.Ed.2d 639 (1980).

[3] *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973).

[4] *Horton v. California,* 496 U.S. 128, 134, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

[5] *United States v. Ramsey,* 431 U.S. 606, 97 S.Ct. 1972 (1977).

[6] *Florida v. Wells,* 495 U.S. 1, 110 S.Ct. 1632 (1990).

[7] *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501 (1984).

code, and had agreed with her husband that she would periodically enter the home to retrieve her mail and other items. This arrangement appears to be an effort by each spouse to maintain civility during a turbulent time in their marriage. Both spouses understood that Cheryl Shelton had authority to enter the home outside the presence of Jimmy Doug Shelton. As such, no matter what restrictions she and her husband decided she should observe while there, she had unfettered – and unsupervised – access to everything inside. Cheryl and Jimmy Doug Shelton were still married – and could conceivably have reconciled if they had chosen to do so. Indeed, neither Cheryl nor Jimmy Doug Shelton took any legal steps to divorce. They were also both involved in the illegal bingo skimming operation.

This set of circumstances gave Cheryl Shelton authority to search the home and seize evidence from it – whether she acted as an agent of the government or for her own reasons. In addition, Jimmy Doug Shelton assumed the risk that his wife (who was also his partner in the bingo skimming operation) would turn on him by searching and seizing evidence of their crimes and turning it over to the government.

Cheryl Shelton's Authority to Consent to the Seizure of Evidence

The Fourth Amendment to the United States Constitution consists of a single sentence:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. These fifty-four words have created an enormous volume of case law in federal and state courts; however, none of the cases the parties, this court, or the Fifth Circuit have cited are directly on point.

On its face, the Fourth Amendment does not prohibit the government from conducting searches and seizures within one's home. The amendment prohibits only *unreasonable* searches and seizures. The ultimate issue to resolve in this case is whether Cheryl Shelton's seizure of the evidence used to convict her husband was reasonable. The court finds that it was.

The Supreme Court has applied the Fourth Amendment to a seizure in the absence of a search[8] – and held that a seizure may implicate the Fourth Amendment even when a defendant's privacy interests in the seized objects are completely extinguished.[9]

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[8] *Soldal v. Cook County, Illinois*, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450, 61 USLW 4019 (1992).

[9] *Paige v. United States*, 136 F.3d 1012, 1021-22 (5th Cir. 1998).

However, as a matter of reason, many of the factors used to determine whether a defendant has a reasonable expectation of privacy in a home (to determine the reasonableness of a search) can *also* be used to determine the degree of a third party's connection to a premises (to determine the reasonableness of a seizure). Naturally, the greater the connection a third party has to a premises, the lower the defendant's expectation of privacy becomes – and the more reasonable a search or seizure authorized by that third party appears. These factors rise and fall together.

Wives and husbands are bound in the closest of relationships – matrimony – and they usually share a residence. As such, situations under which a wife could *not* consent to a search of the premises – and the seizure of evidence therefrom – will be rare. The intimate nature of the marital relationship gives either spouse the authority to consent to searches and seizures within the marital home.[10] Cheryl Shelton chose to move out of the marital home and move in with her sister because Cheryl believed her husband had been unfaithful to her. Neither party, however, took any legal steps to initiate a divorce, and Jimmy

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[10] An exception to this rule can be found in the United States Supreme Court's holding in *Georgia v. Randolf*, 547 U.S. 103, 126 S.Ct. 1515 (2006). The *Randolf* court held that one spouse cannot consent to the search of a premises when the other spouse is physically present and objects to the search. *Randolf* does not apply to the facts of this case, as Jimmy Doug Shelton was not physically present to object to the searches in question.

Doug Shelton consented to Cheryl Shelton's unfettered access to the home. He took *no* steps to hide the evidence of illegal skimming from the charity bingo operation from his wife by removing the evidence from the home or locking it away.

In addition, Cheryl Shelton's decision to move in with her sister in no way limited her access to the marital home; she just chose to live elsewhere in light of the belief that her husband had been unfaithful. Indeed, under Mississippi law it appears unlikely that Jimmy Doug Shelton could legally have prevented his wife from entering the marital home in the absence of a court order. First, any property brought into the marriage by one spouse and used by the family becomes a marital asset. *Johnson v. Johnson,* 650 So.2d 1281, 1286 (Miss. 1994). Such appears to be true of the Shelton home in this case, as Cheryl and Jimmy Doug Shelton lived together in the home for six years. Second, Mississippi does not recognize "legal separation;" as such, Cheryl Shelton's departure from the marital home did not divest her from an equitable interest in it. *Aron v. Aron,* 832 So.2d 1257 (Miss. App. 2002). The court thus finds that the residence from which Cheryl Shelton seized and removed evidence was still the martial home at the time of seizure. Therefore, Cheryl Shelton had actual authority to conduct a search of the home and to give valid consent to seize the evidence.

Jimmy Doug Shelton's Assumption of the Risk That Cheryl Shelton Would Turn on Him

The authorities regarding third party consent to search and seize evidence frequently discuss the doctrine of assumption of the risk. Some courts apply the doctrine to partners in crime; "'[T]he risk of being . . . betrayed by an informer or deceived as to the identity of one [with] whom one deals is probably inherent in the condition of human society.' In other words, 'that's life.'" *United States v. Schuster,* 684 F.2d 744, 748 (11th Cir. 1982) (citations omitted), *reh'g granted and opinion adopted,* 717 F.2d 537 (1983) (en banc), *cert. denied,* 465 U.S. 1010, 104 S.Ct. 1008, 79 L.Ed.2d 239 (1984). Other courts apply the doctrine to defendants who share joint control over a residence with a third party. *United States v. Smith,* 930 F.2d 1081, 1085 (5th Cir. 1991). Unfortunately for Jimmy Doug Shelton, both scenarios apply to this case. Assumption of the risk is a doctrine seeking to quantify the reasonableness of searches and seizures. The law recognizes that human beings sometimes breach the duty of fidelity in their dealings with each other. As such, expecting absolute fidelity from all those with whom we associate is not reasonable. All people must take this fact of human nature into account when making decisions every day – weighing the benefit of dealing with someone against the risk that he might cause them harm. Just as a husband may not be faithful to his wife, a criminal may not be faithful to her partner in crime – and may turn him in to law enforcement.

These are examples of a larger view of assumption of the risk, which can be stated thus: The more tightly bound one is to another, the more the two can accomplish together, but the more harm each risks from the other. In recognition of this assumption of risk – and in an effort to promote full and free communication within certain close relationships – some states have created rules that prohibit the compulsion of testimony from people bound in such relationships. *See, e.g.,* MISS. R. EV. 502 (Lawyer-Client Privilege), 503 (Physician-Psychotherapist Privilege), 504 (Husband-Wife Privilege), 505 (Priest-Penitent Privilege). Outside of such privileges, however, people assume the risks reasonably incurred from their close association with others – particularly close criminal association.

Jimmy Doug Shelton and his wife were connected not only by marriage, but by the bonds of criminal enterprise. Indeed, Cheryl Shelton returned to the marital home to alter bingo cards for the skimming operation – and did so *after* moving in with her sister. Under the doctrine of assumption of the risk, it matters little whether this was done at the behest of her husband or another involved in the skimming operation.[11] Either way, the co-participants in the

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[11] For this reason, Ground Three of the instant petition – that appellate counsel was ineffective for improperly conceding facts that were untrue – must fail. Whether Jimmy Doug Shelton or someone else had invited Cheryl Shelton into the marital home to participate further in the skimming operation is irrelevant. Cheryl Shelton was part of the criminal enterprise

(Continued on following page)

crime assumed the risk that the others might turn them in to the authorities. This additional bond only strengthens Cheryl Shelton's authority to consent to the seizure of the evidence – and weakens Jimmy Doug Shelton's argument that her seizure of the evidence used against him was unreasonable. The court thus finds that when Jimmy Doug Shelton included his wife in the illegal bingo skimming scheme, he assumed the risk that she might seize evidence from their marital home for use by the government against him.

Jimmy Doug Shelton argues that once Cheryl Shelton became an agent for the government, she could no longer do anything that a government agent could not do, and that the assumption of the risk argument therefore does not apply:

> Under the holdings of *Jenkins* and *Shelton,* anyone who trusts a third party – be that third party an estranged spouse, an employee, a housekeeper, a nanny, or a law clerk, and allows that person access to one's house or office – "assumes the risk" that this person will be recruited by the Government and thereafter used as an agent to conduct warrantless searches and seizures of one's property.

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and had been for some time. Jimmy Doug Shelton knew it and encouraged her participation. Thus, he assumed the risk that she might seize evidence from their home and turn him in to the authorities.

Movant's Supplemental and Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, p. 11.

First, other than "estranged spouse," the third parties used as examples in this parallel do not even approximate the level of intimacy of the marital and criminal relationship between Jimmy Doug Shelton and Cheryl Shelton. Employees, housekeepers, nannies, and law clerks (the strangest example) would not be closely bound to Jimmy Doug Shelton – or to his home. As such, the comparison between these peripherally related third parties and a husband and wife is not meaningful.

Second, this argument is both irrational and impractical. The rule Jimmy Doug Shelton seeks to impose here cannot logically be applied in even the simplest situation. For example, under this proposed rule of law, once Cheryl Shelton became an informant for the government, she would need a warrant to enter the marital home – because a federal agent would need a warrant to do the same thing. She would likewise need a warrant to enter her husband's office – because a federal agent would need a warrant for that, as well. Had she not moved out of the marital home, she would also need a warrant to turn out her husband's pants pockets while doing laundry – because a federal agent would need a warrant to do so. Such examples of the impracticality in applying this rule are endless.

The proper – and rational – rule is that informants in the position of Cheryl Shelton wear two hats – one as civilians living their lives – the other as government informants collecting evidence. Under the governing Fifth Circuit precedent, "[B]ecoming an 'agent' for the purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering the agency relationship." *United States v. Jenkins,* 46 F.3d 447 (5th Cir. 1995). Such is the case here. Cheryl Shelton had unfettered access to the marital home and its contents before she became an agent for the government. Her decision to assist the government with its case against her husband did not change that access – or require her to seek a warrant before searching the premises and seizing evidence to be used against her husband.

Criminals assume the risk that their partners in crime – and people with whom they share a residence – may assist law enforcement authorities. This is also known as the "misplaced trust" theory. *Schuster,* 684 F.2d at 748. In this case, prohibiting a wife from collecting evidence of her husband's criminal behavior "goes far beyond making 'every man's house his castle,' and permits [him] to convert his house into 'a den of thieves.'" *Trammel v. United States,* 445 U.S. 40, 53, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (internal citations omitted). The court finds that Cheryl Shelton had actual authority to consent to a search of the marital home – and that Jimmy Doug Shelton assumed the risk that his wife and partner in crime

might search the premises, collect evidence, and turn it over to the government. As such, his attorney's decision not to challenge the seizure of the evidence used against him was reasonable. Thus, Jimmy Doug Shelton's claims of ineffective assistance of trial and appellate counsel must fail.

Finally, the movant requested in his supplemental motion under 28 U.S.C. § 2255 that the court set an evidentiary hearing to determine whether the search and seizure carried out by Cheryl Shelton violated the Fourth Amendment. The record, however, contained all the necessary facts for the court to resolve this issue. As such, the request for an evidentiary hearing shall be denied.

In sum, for the reasons set forth above, the instant motion by Jimmy Doug Shelton to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 shall be denied. A final judgment consistent with this memorandum opinion shall issue today.

SO ORDERED, this the 16th day of November, 2007.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
EASTERN DIVISION

JIMMY DOUG SHELTON **PETITIONER**

v. **No. 1:00CR127-P-D**

UNITED STATES OF AMERICA **RESPONDENT**

FINAL JUDGMENT

(Filed Nov. 16, 2007)

In accordance with the memorandum opinion issued today in this cause, the instant motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 is hereby **DENIED** with prejudice and without evidentiary hearing.

SO ORDERED, this the 16th day of November, 2007.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES
OF AMERICA

VERSUS

CRIMINAL ACTION
NO. 1:00CR127-P-D

JIMMY DOUG SHELTON,
et al.

MEMORANDUM OPINION

(Filed Dec. 21, 2001)

This cause is before the Court for consideration of the Magistrate judge's Report and Recommendation that the defendant Jimmy Doug Shelton's Motion to Suppress evidence seized by Cheryl Shelton [119-1] be granted.

The government filed timely objections to the report and recommendation. After due consideration of the objections and a de novo review of the record, as well as the parties' initial submissions and the applicable case law, the Court finds as follows, to-wit:

FACTUAL BACKGROUND

The relevant facts are generally undisputed. In April, 1997, Cheryl Shelton left her husband and the house in which they lived. Upon her departure she left several personal belongings including clothing, photographs, personal and financial documents, memorabilia, and various items of furniture. Although she

was not a co-owner of the house, she retained a key and a security access code for the alarm system.

On May 3, 1997, Cheryl returned to the homes with her sister, Debbie Wheeler, and retrieved some personal belongings. During this visit, her sister, who had been cooperating with the government since the previous month, videotaped boxes of bingo cards. At the suggestion of her sister, Cheryl decided that she would also cooperate with the government. On approximately May 5, 1997, Cheryl met with Special Agent Bostick of the IRS and AUSA Spillers and began to cooperate in the criminal investigation of her husband, Jimmy Doug Shelton. During this meeting, Cheryl advised them of various items of evidence located in the house that could assist in the investigation. The items included bingo cards and a pink notebook on top of a grandfather clock in the entranceway in which Mr. Shelton kept records of the alleged skimming operation. Cheryl turned over to the investigators the videotape that her sister had made on the visit two days previous. The agents advised Cheryl that they desired her to obtain any evidence of the alleged skimming operation, particularly the pink notebook.

Over the next several months, Cheryl visited the home several times and retrieved evidence that she thought would assist in the investigation. She would also pick up her mail and other personal items during these visits. On some of these occasions she was accompanied by her daughter, her sister or defendant Sue Carnathan.

On May 10, 1997, Cheryl retrieved two pages from the pink notebook and provided them to government agents. The record also reveals the following entries into the home and corresponding evidence obtained:

1. May 22, 1997 – 12 photos of skim records and 3 photos of boxes of bingo cards.

2. May 29, 1997 – 24 photos of boxes of bingo cards, promissory note drawn by Jimmy Doug Shelton to pay Billy Shelton $100,000 in $2,500 monthly payments, handwritten schedule of $97,500 of $2,500/mo. payments, a receipt dated 12-3-96 showing a $2,500 payment to Billy Shelton, and a typed payment schedule dated 11-6-95 to 10-18-96.

3. July 22, 1997 – bingo paper packing slip

4. July 31, 1997 – pink notebook; agents copied the notebook and Cheryl returned it to the top of the grandfather clock.

5. August 1, 1997 – at Sue Carnathan's request, Cheryl accompanied Carnathan to the house so Carnathan could pick up some illegal bingo cards.

6. August 6, 1997 – note signed by Jon Shelton regarding the "exact amount" on the paperwork and bingo session sheets for 1-25-97, 1-26-97 and 2-2-97.

7. August 7, 1997 – furnished skim records and envelope of 8-1-97 skim record to agents who photocopied.

8. August 8, 1997 – volunteer invoice/packing slip dated 6-17-97 for bingo cards sold to "Bob Harrison".

The record also demonstrates that on at least three occasions, Cheryl Shelton made use of the house to participate in the very skimming operation with regard to which she was removing evidence. On two of these occasions, in September and October of 1997, Cheryl Shelton altered bingo session sheets with the knowledge, and at the direction, of Mr. Shelton. The defendant was at that time trusting that Cheryl was still a co-conspirator.

At no time did Mr. Shelton attempt to limit Cheryl's access to the home or the evidence in question. Cheryl's key and access code were the same she had always had. Likewise, incriminating evidence was kept in the same locations. Mr. Shelton knew that Cheryl frequented the residence and that the evidence in question was easily accessible to her. However, there is no evidence to indicate that he made any attempt to exclude her. At all relevant times, Cheryl Shelton remained the lawful wife of Jimmy Doug Shelton.

LEGAL ANALYSIS

The issue presented for this Court's consideration is whether Jimmy Doug Shelton's Fourth Amendment rights were violated when the government obtained access to the evidence through the cooperating witness without a warrant. The defendant's principal

contention is that Cheryl became an "agent" of the government for Fourth Amendment purposes, and, therefore, could not do what the government investigators themselves could not do. Moreover, according to the defendant, Cheryl Shelton did not have the adequate authority to consent to a search.[1] As a result, the defendant argues, each entry and acquisition of evidence by Cheryl Shelton constituted an unreasonable search in violation of Mr. Shelton's Fourth Amendment rights.

The Fifth Circuit visited a similar set of facts in *Jenkins v. United States,* 46 F.3d 447 (5th Cir. 1995). In *Jenkins* an employee of a distributer of allegedly obscene videotapes became a cooperating government witness in the criminal investigation of his employer. Over a five week period, the employee allowed the FBI to examine and copy a number of the videotapes that came into his possession. In holding that no Fourth Amendment violation occurred, the court recognized a simple, yet cogent principle: One who possesses the authority to engage in certain conduct before becoming an "agent" of the government may continue to engage in the same conduct without implicating the Fourth Amendment. In the Fifth Circuit's words, "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior

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[1] The defendant concedes that Cheryl Shelton's consent to cooperate with the government was voluntary. (Def. Supplemental Memorandum at 1).

to entering the agency relationship." *Jenkins,* 46 F.3d at 460. Thus, because the employee maintained the same actual and apparent authority over the videotapes before and after his initial cooperation with the government, his conduct in turning over the disputed materials to the FBI did not violate the Fourth Amendment. The relevant inquiry, therefore, is whether Cheryl Shelton possessed the adequate authority such that she could have consented to a search in her own right which would have yielded the evidence at issue at the time of her agreement with the government. If so, whether or not she became an "agent" of the government is irrelevant because such conduct does not violate the Fourth Amendment. *Id.*

I. Third-Party Consent & Assumption of the Risk

The Fourth Amendment protects against government infringement of a reasonable expectation of privacy. *U.S. v. Jacobsen,* 466 U.S. 109 (1984). There are two requirements for the existence of a privacy interest protected by the Fourth Amendment: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Thus, a citizen is not protected from every "search", but, only searches that are "unreasonable". *Illinois v. Rodriguez,* 497 U.S. 177 (1990).

Although warrantless searches are generally prohibited, it is well settled that a search pursuant to consent is not unreasonable for purposes of the Fourth Amendment. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). Moreover, the authority to consent is not limited to the defendant, but may exist in third parties who possess "common authority" over or other "sufficient relationship" to the premises or effects sought to be inspected, *United States v. Matlock,* 415 U.S. 164, 171 (1974).

> The consent of one who possesses common authority or effects is valid against the absent, nonconsenting person with whom that authority is shared. . . . The authority which justifies the third-party consent . . . rests . . . on the mutual use of the property by persons generally having access for most purposes, so that it is reasonable to recognize that any coinhabitant has the right to permit inspection of his own right and that others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171 n. 7. The hallmarks of third-party consent, then, are common authority or a sufficient relationship to the premises and assumption of the risk. As one court has succinctly stated, the inquiry is a "multi-factored factual question that turns on the access, use, and reasonable expectations of the parties involved." *United States v. Ramirez,* 115 F.Supp.2d 401, 408 n. 14 (S.D.N.Y. 1996).

Applying these principles, the Court is of the view that the facts in the instant case militate even more heavily against suppression than the scenario in *Jenkins.* Cheryl Shelton enjoyed full and free access to the house at all relevant times. She also retained a key, an alarm access code and personal belongings at the residence. Further, this case involves a spousal relationship, unlike the employer/employee relationship in *Jenkins.* A purview of third-party-consent cases in federal courts reveals that the particular type of relationship becomes important inasmuch as it bears upon the property at issue – that is, inasmuch it is bears upon a "sufficient relationship" to the premises and, in turn, the defendant's reasonable expectation of privacy.[2] Thus, at least one Circuit has employed a presumption that one spouse has the authority to consent to a search of all areas of the homestead. *United States v. Duran,* 957 F.2d 499, 505 (7th Cir. 1992). The Seventh Circuit applied the presumption again, this time to a situation where the wife was no longer living at the home, in *United States v. Gevedon,* 214 F.3d 807 (7th Cir. 2000). There, the estranged wife gave consent to authorities to search the marital home and detached garage even though she no longer lived there. According to the court:

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[2] It is, therefore, important with respect to the degree to which the defendant assumed the risk that the third party would consent to a search.

> The clear and simple fact is that Jackie was still William's legal wife at the time she consented to the searches. Presumptively, then, she had the actual authority necessary for valid consent. William has not rebutted this presumption.

Gevedon, 214 F.3d at 811.

The government need not rely on the implement of a presumption in this instance, however. Certainly an opposite presumption does not exist. The record is clear; the defendant made no attempt whatsoever to limit Cheryl Shelton's access to the house, nor did he attempt to exclude her in any way from the evidence she obtained. Indeed, on at least one occasion, he asked if she would stay the night while he was out of town. On other occasions he had her over specifically to engage in the conduct with regard to which she was collecting evidence. In light of the evidence that Mr. Shelton not only failed to exclude, but even encouraged free access, the Court finds that Cheryl Shelton had actual authority to permit a search "in [her] own right."

Several courts have held that a spouse's consent may be effective even after leaving the marital home. For example, in *United States v. Trzaska,* 859 F.2d 1118 (2d Cir. 1988), the consent of an estranged wife was effective even though she had moved out of the apartment two weeks earlier. In that case, the wife accompanied the police to the apartment where they conducted a search. While gathering some of her personal belongings, she directed the officers to the

location of her husband's weapons. The Court rejected the defendant's arguments that since she no longer lived there she had ceased to have "mutual use" or "common authority" over the premises searched and that her desire to pick up some personal belongings was insufficient evidence of such "mutual use". *Trzaska,* 859 F.2d at 1120. The court pointed to the fact that she had recently moved out, possessed a key to the residence, and did remove some personal belongings as sufficient to establish adequate authority.

Applying the Second Circuit's analysis to this case, Cheryl Shelton had the authority to consent to a search. Like the wife in *Trzaska,* she had also recently moved out and possessed a key. Moreover, she also had a security access code. The evidence demonstrates that, although Cheryl's primary purpose may have been to gather evidence against her husband, she too had her own purposes at the times in question; she picked up some of her personal belongings, checked for phone calls, and gathered her mail.

In a similar case, the Tenth Circuit held an estranged wife's consent effective although she was living with her parents at the time. *United States v. Crouthers,* 669 F.2d 635 (10th Cir. 1982). In so holding, the court noted that she possessed a key and had not completely abandoned the marriage or the apartment. *Crouthers,* 669 F.2d at 643. The same factors are present with regard to Cheryl Shelton.

Although the factual milieu of cases in this area is particularly varied and intensive in nature, the

general proposition that is borne out remains constant: a spouse who no longer lives in the marital home may nonetheless retain actual authority to consent to a search where, as here, there is other strong indicia of authority.[3]

The Court concludes, therefore, that the fact Cheryl Shelton was no longer residing at the house did not vitiate her authority to consent to a search in this case. The authority of one who has full access to a property is not diluted by actual non-use. Likewise, neither is that authority limited to certain areas, especially when a spousal relationship is involved. *See, e.g., Gevedon,* 214 F.3d at 811 (estranged wife's

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[3] For further illustrations of this principle, *see United States v. Brannan,* 898 F.2d 107 (9th Cir. 1990) (wife's consent effective though husband had changed the locks where she was joint owner but from which she had recently moved when husband was arrested); *United States v. Long,* 524 F.2d 660 (9th Cir. 1975) (although wife had moved out because of fear for her safety and husband had changed locks so that her key would not work, wife's consent to search was effective as she "had a joint right to control the house with her husband and in fact exercised that right at the time she accompanied the agents to the house by collecting her personal belongings from the house while the agents were conducting the searches"); *See also State v. Madrid,* 574 P.2d 594 (App.1978) (relying on *Matlock,* wife who had left home 5 months earlier could still consent where she had a key and had left personal effects there).

The Court notes that none of these cases involved a situation in which the non-consenting spouse facilitated use of the marital home to the consenting spouse in order to advance the alleged criminal enterprise. In this sense, any expectation of privacy Mr. Shelton may have had was even less reasonable.

consent effective for search of the attic even though she had only entered it once where defendant failed to demonstrate he had excluded her from it); *Duran*, 957 F.2d at 506 (holding that where wife had key and access to a farmhouse which was used solely by her husband as a gym, the fact that she never entered or used the property, nor had any personal effects inside, did not eviscerate the effectiveness of her authority to consent to search).[4] Such reasoning has lead one prominent commentator to conclude that, under the *Matlock* test, the only effective way to prevent a spouse who has full access to the marital home from giving valid consent is for the property to be under the exclusive control of the non-consenting spouse and for the non-consenting spouse to deny access to the consenting spouse. 3 Wayne R. LaFave, *Search and Seizure*, § 8.4(a) at 762 (3d ed. 1996). Neither circumstance is present here with regard to the evidence at issue. The defendant's argument that while Cheryl Shelton may have had free access to the house, she did not have such access, for instance, to the top of the grandfather clock or other areas in which the evidence was located is, therefore, dubious.

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[4] *See also, e.g., United States v. Clow*, 26 M.J. 176, 187 (CMA 1988) (applying the same principle where an estranged spouse had left months earlier; "absent a clear showing that one spouse has 'exclusive use' of some area within the marital residence or of some desk, bureau, cupboard, or other piece of furniture located therein . . . a spouse's access to the marital residence should be treated as access to all parts of that residence and to the contents of any furniture or containers located there").

The facts in the instant case are clearly inconsistent with such a conclusion, not only because areas such as the top of a grandfather clock in the entranceway can hardly be considered "exclusive", but, particularly in light of her participation as a co-conspirator in making the skim records and generating the evidence from the outset.

The defendant's attempt to distinguish some of the foregoing authorities on the basis of "ownership", moreover, is unconvincing. While it is true that some courts in third-party consent cases have weighed legal ownership as a factor in the applicable analysis, "ownership is not the *sine qua non* of authority to consent." *Jenkins,* 46 F.3d at 455. The law of property, "with its attendant historical and legal refinements", does not constitute the predicate on which the authority of the third-party consent rests. *Id.* at 455 (citing *Matlock,* 415 U.S. at 171 n. 7).

Indeed, the fact of non-ownership has not precluded valid consent on facts in which the third party's relation to the property is much more tenuous than the circumstances in the instant case. For example, in *U.S. v. Murphy,* 506 F.2d 529 (9th Cir. 1974) (per curiam), an employee granted consent to authorities to search his employer's warehouse. Even though the employee had no status as a lessee of the property, much less an owner, and was given the key to the warehouse only on occasions when he was to perform work there, the court held his consent effective. *Murphy,* 506 F.2d at 529. In so holding, the court reasoned:

> In considering all of the circumstances surrounding the search, we attribute special significance to the fact that Murphy delivered the key to Tucker. We conclude that Tucker's custody of the key gave him sufficient dominion over the premises to enable him to grant the necessary consent. Since Murphy himself put the premises under the immediate and complete control of Tucker, who voluntarily consented to the search, we hold that the search was not unreasonable.

Id. In this case, Cheryl Shelton, likewise a non-owner of the property, but more than a mere employee, not only had a key, but her own alarm code, and unlike the employee in *Murphy,* was not limited by the defendant in her use of the premises. The Court finds that the fact of non-ownership in this instance, viewed in the "totality of the circumstances" did not operate to divest Cheryl Shelton of her authority or "dominion" over the premises.[5]

Nor does the fact that this case involves multiple entries on the part of Cheryl Shelton serve to sufficiently distinguish the case at hand. Again, the inquiry is whether she had authority such that she could have consented in her own right to a search of the premises at the time of the government

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[5] With regard to the particular skimming records at issue, moreover, a claim of ownership on the part of Mr. Shelton as against his co-conspirators, among whom Cheryl Shelton was one, seems problematic.

agreement. Until that authority is vitiated, engaging in activity which she already had the right to engage in does not implicate the Fourth Amendment. Thus, it is irrelevant that the employee in *Jenkins* obtained evidence for the FBI on multiple occasions. He only confirmed doing that which he had already had the authority to do. Presumably, had that employee been fired or otherwise excluded during the time he was cooperating with authorities, he could of have thereafter gone back and obtained evidence if indeed he was found to be acting as an agent of the government. Only in one of two situations, then, would the inquiry as to whether he became an "agent" of the government become relevant: (1) if he did not possess the authority in the first place to consent to a search at the time he began cooperating; or (2) if he did have that authority at the outset, but somehow lost it and then proceeded to remove evidence anyway.

As in *Jenkins,* neither circumstance is present the case at hand. At no time during the period in which Cheryl removed evidence from the house can it be said that her authority which existed at the time of her agreement with the government was impaired. No intervening event such as a change of the locks, the taking back of the key and access code, the initiation of a legal proceeding effecting the status of the marriage, or even a communication that free access should no longer be enjoyed – all things easily within power of Mr. Shelton to effect – took place during the period in question.

Instead, the record reveals that Mr. Shelton encouraged the use of the premises during the relevant time period. Indeed, on at least three occasions during this period, Cheryl Shelton made use of the house to participate in the very skimming operation with regard to which she was removing evidence, with the knowledge of Mr. Shelton. On one occasion, in August of 1997, she accompanied defendant Sue Carnathan to the house so Carnathan could pick up some illegal bingo cards. On two more occasions, in September and October of 1997, Cheryl Shelton altered bingo session sheets at Mr. Shelton's direction. These facts exhibit not only continued access to the house, but also free access to the evidence at issue.

By his conduct in permitting such access to the residence as well as the incriminating evidence in question, Mr. Shelton assumed the risk that Cheryl Shelton would cooperate with authorities. In *Hoffa v. United States*, 385 U.S. 293 (1966), the petitioner argued that the failure of the informant to disclose his role as government informant vitiated the consent the petitioner gave for the informant's access to evidence of criminal wrongdoing. *Hoffa*, 385 U.S. at 300. The Supreme Court rejected the argument because "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. Therefore, the fact that Mr. Shelton would not have consented to a cooperating witness having access to his house and records of his skimming operation, while "clearly true . . . is a red

herring which has no effect on [Cheryl's] actual or apparent authority." *Jenkins,* 46 F.3d at 456. Because Mr. Shelton voluntarily revealed evidence of criminal wrongdoing to Cheryl Shelton, there was no reasonable expectation of privacy to invade.

Cheryl Shelton did not see or hear anything that Mr. Shelton did not either allow or intend for her to see or hear, nor did she overstep her access. Thus, the fact that her entries were gained based on an element of pretext is of no significance. It is well settled that the use of such pretext to gain access to evidence is permissible where, as here, the bounds of that access are not exceeded.[6] As in *Hoffa,* the defendant in this case was not relying on any expectation of privacy when he permitted free access to the house and evidence. Rather, he was relying upon a misplaced confidence that Cheryl would not reveal evidence of the skimming operation. *See Hoffa,* 385 U.S. at 303;

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[6] *See, e.g., Lewis v. United States,* 385 U.S. 206 (1966) (No Fourth Amendment violation where agent gained access to defendant's home based on pretext where he stayed within bounds of access provided and disclosed evidence voluntarily revealed); *United States v. Berry,* 722 F.2d 443 (9th Cir. 1983) (Ruse by IRS to gain access to defendant's skimming records as not a violation of Fourth Amendment where the agents pretended to be fellow criminals in order to gain the confidence of the defendant); *United States v. Schuster,* 684 F.2d 744, 748-49 (11th Cir. 1982) (No Fourth Amendment violation where third-party, who had become agent of the government, allowed Secret Service Agent to accompany him on visit to defendant's apparent where defendant had consented to third party's entry), *reh'g granted,* 697 F.2d 910 (11th Cir. 1983).

United States v. Tarrant, 460 F.2d 701, 702 (5th Cir. 1972). In short, Mr. Shelton had no reasonable expectation of privacy vis-a-vis his wife and co-conspirator Cheryl Shelton.

It appears the defendant would have the Court hold otherwise almost purely based in the seemingly surreptitious and deceptive nature of the conduct of Cheryl Shelton. In the defendant's view, such conduct should not be condoned. Indeed, the abuse of trust in this instance, by virtue of the spousal relationship, may exceed those cases where the confidant was merely an employee or friend. The Fourth Amendment, however, makes no such social judgements. For, "however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities." *United States v. White,* 401 U.S. 745, 749 (1971).

II. Apparent Authority

Finally, the Court notes that even if Cheryl Shelton lacked actual authority by virtue of her no longer residing at the house, government investigators were, at minimum, reasonable in the belief that she had the actual authority to consent to a search. Therefore, the exclusionary rule should not operate to exclude the evidence at issue. *See Illinois v. Rodriguez,* 497 U.S. 177 (1990).

Because the Court concludes that Cheryl Shelton possessed the authority to consent to a search at the time of her agreement with the government and throughout the relevant period, the question as to whether she became an agent of the government for Fourth Amendment purposes is irrelevant and the Court need not reach it. Simply put, her conduct did not implicate the Fourth Amendment.

CONCLUSION

Based on the foregoing analysis, the Court respectfully declines to adopt the Honorable Magistrate's recommendation in this instance. Consequently, the defendant's motion to suppress the evidence at issue is denied. A separate order in accordance with this opinion will be so entered.

THIS, the 19th day of December, 2001.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES
OF AMERICA

VERSUS

JIMMY DOUG SHELTON,
et al.

CRIMINAL ACTION
NO. 1:00CR127-P-D

JUDGMENT

(Filed Dec. 21, 2001)

In accordance with a Memorandum Opinion issued this day, it is hereby ORDERED that:

1. Jimmy Doug Shelton's motion to suppress evidence seized by Cheryl Shelton [119-1] be DENIED.

SO ORDERED, this the 19th day of December, 2001.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

V. NO. 1:00CR127-P-D

JIMMY DOUG SHELTON, ET AL DEFENDANTS

REPORT AND RECOMMENDATION ON DEFENDANT JIMMY DOUG SHELTON'S MOTION TO SUPPRESS EVIDENCE SEIZED IN THE COURSE OF WARRANTLESS ILLEGAL SEARCH

(Filed Nov. 20, 2001)

Defendant Jimmy Doug Shelton has filed a motion to suppress evidence obtained by Shelton's estranged wife Cheryl during several entries to Shelton's home during the period after Cheryl left the martial home. Cheryl Shelton conducted these searches and seized evidence under the direction and consent of the government and at a time when she was being paid by the government. The undesigned has conducted an evidentiary hearing on this motion and oral argument by the attorneys for the parties. During oral argument the government conceded that Cheryl Shelton was acting as a government agent during the questioned searches and seizures. Therefore, this Report and Recommendation will focus on whether Cheryl Shelton had the authority to consent to the searches and seizures.

FACTUAL BACKGROUND

The salient facts underlying this motion are not substantially in dispute. Cheryl Shelton left her husband, Jimmy Doug Shelton, in late April of 1997. When she left the marital home, she left behind some clothing, photographs, personal and financial documents, memorabilia, and items of furniture.[1] She was not a co-owner of the home.

On or about May 5, 1997, Cheryl met with Special Agent Bostick of the IRS and AUSA Spillars and she began to cooperate with the criminal investigation of her husband. She was granted immunity from prosecution and she was also paid various sums for living expenses. Cheryl retained a key to the home and the access code for the alarm system. In fact, she had returned to the home on May 3, 1997, with her sister, Debbie Wheeler, and retrieved her summer wardrobe and items of jewelry. While there, her sister, who had been cooperating with the government since the previous month, videotaped boxes of bingo cards.

At the initial meeting with the government, Cheryl advised them that there was evidence that

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[1] This is really the only area of factual dispute. Kathy Johnson, who cleaned defendant Shelton's home, testified that she cleaned the home shortly after Cheryl left and that Chery had taken all of her belongings except a plastic bag of mildewed clothing which Johnson threw away. However, for the purposes of this motion, the court finds that Cheryl left personal items behind.

would assist the investigation at the house, to include bingo cards and a pink notebook on top of a grandfather clock in which defendant Shelton kept records of the alleged skimming operation. She turned over the videotape that her sister had made on May 5, 1997, and was advised by the agents they would like her to obtain any evidence of the alleged skimming operation, particularly the pink notebook.

Over the coming months, Cheryl entered the home numerous times to ostensibly retrieve personal items. During these visits she would retrieve evidence that she thought would assist in the investigation or evidence she was asked to retrieve by the agents. She would also pick up her mail and other personal items. Sometimes she was accompanied by her daughter, her sister or defendant Sue Carnathan. While government agents knew of these visits, they did not accompany Cheryl into the home.

On May 10, 1997, Cheryl, at the direction of the agents, retrieved two pages from the pink notebook and gave them to the government agents. According to the evidence at the hearing, Cheryl also made the following entries into the home and recovered evidence:

1. May 22, 1997 – 12 photos of skim records and 3 photos of boxes of bingo cards.

2. May 29, 1997 – 24 photos of boxes of bingo cards, promissory note of Jimmy Doug Shelton to pay Billy Shelton

$100,000 in $2,500 monthly payments, handwritten schedule of $97,500 of $2,500/mo. payments, a receipt dated 12-3-96 showing a $2,500 payment to Billy Shelton, and a typed payment schedule dated 11-6-95 to 10-18-96.

3. July 22, 1997 – bingo paper packing slip.

4. July 31, 1997 – furnished agents pink notebook; agents copied the notebook and Cheryl returned it to the top of the grandfather clock.

5. August 1, 1997 – at Sue Carnathan's request, Cheryl accompanied Carnathan to the house so that Carnathan could pick up some illegal bingo cards.

6. August 6, 1997 – note signed by Jon Shelton regarding the "exact amount" on the paperwork and bingo session sheets for 1-25-97, 1-26-97 and 2-2-97.

7. August 7, 1997 – furnished skim records and envelope of 8-1-97 skim record to agents who photocopied.

8 August 8, 1997 – volunteer invoice/ packing slip dated 6-17-97 for bingo cards sold to "Bob Harrison."

See, Defense Exhibit 6.

Defendant Shelton did not attempt to limit Cheryl's access to the home and the items taken and turned over to the agents were in areas of the home to which she had free access. On several of the entries

into the home, government agents conducted surveillance of the area while Cheryl was in the home. At least twice she gave the agents the pink notebook or related items for immediate copying and return to the home. This was done at the direction of the agents. Although Cheryl may have retrieved personal items on her visits to the house, the undersigned finds that the primary purpose was to retrieve evidence against her husband as directed by the government.

LEGAL CONCLUSIONS AND RECOMMENDATION

The government has conceded that Cheryl Shelton was acting as a government agent when she entered the marital home on May 10, 1997, and thereafter. The government contends, however, that defendant Shelton's acquiescence to Cheryl's entry into the home coupled with his failure to change the locks and the security code is evidence that he assumed the risk that Cheryl might consent to a search of the premises and that Cheryl had sufficient common authority and joint access to the residence to consent to a search. The government also contends that the government agents were justified on Cheryl's apparent authority to consent to a search and that any evidence seized by Cheryl is admissible whether the court concludes Cheryl was a government agent or not.

Turning first to the question of whether Cheryl was a government agent or not, the undersigned reminds the government that they conceded that

point at oral argument. In an event, the undersigned finds that Cheryl Shelton was clearly acting as a government agent when she entered defendant Shelton's home on May 10, 1997, and thereafter. The Fifth Circuit has formulated a two-part test to determine whether a party has become an instrument or agent of the government First, did the government know or acquiesce in the conduct, and, second, did the person performing the search intend to assist law enforcement efforts or assist her own ends? *United States v. Jenkins,* 92 F.3d 430, 460 (5th Cir. 1995), quoting *United States v. Miller,* 688 F.2d 652, 657 (9th Cir. 1982); *see, also, United States v. Dahlstrom,* 180 F.3da 677 (5th Cir. 1999). The answer to both questions is yes. As stated earlier, Cheryl Shelton was acting as a government agent when she entered the home on May 10, 1997, and thereafter.

One of the primary cases relied upon by the government is the previously cited *Jenkins* case. In *Jenkins* an employee of defendant became a cooperating witness and allowed the FBI to examine certain pornographic videotapes that would come into his possession. This employee was the only one of the defendant's employees in that geographic area who had access to the videotapes. The Fifth Circuit found that the employee had actual authority over the videotapes and that there was no Fourth Amendment violation by allowing the government to copy them. As noted by the court, the defendant had "vested possession [of the videotapes] and almost absolute control" over them to the employee. *Jenkins* at 456. It

was uncontradicted that the witness was the sole employee at the facility in Memphis, that he was the intended recipient of the packages shipped to him, that he was authorized to open the packages and extract the videotapes, and that he had sufficient dominion and control over the packages that he could pick them up and carry them away. *Id.*, at 455-56. In *Jenkins,* the court found that the employee had acted within his authority and that it didn't matter whether he was an agent of the government or not. *Jenkins* at 460. The undersigned finds that there are significant differences between this case and the scenario presented by *Jenkins.* First, Cheryl Shelton had no ownership rights in the defendant Shelton's home. Moreover, she had left that home but did have permission to reenter for the purpose of picking up her personal items. There is no evidence that defendant Shelton's permission exceeded that purpose. In fact, every time he was aware Cheryl was in the house it was allegedly for picking up her mail or other personal items. She did not have unfettered permission to do what she wished. The undersigned finds that the principal reason Cheryl entered the house was to obtain evidence for the agents. This is particularly shown by the times the agents placed the area under surveillance while Cheryl entered, brought out items to be copied, and then returned the items. Picking up mail and personal items was secondary to the primary mission of assisting the government and herself. Defendant Shelton clearly did not consent to a paid government informant

entering his home to retrieve other than personal items.

The Supreme Court has stated that a warrantless search of a person's home would be sanctioned if consent was obtained from a third party who had common authority over the premises. *Illinois v. Rodriguez,* 497 U.S. 177 (1990). "Common authority" was defined as "mutual use of the property by persons generally having joint access or control for most purposes." 497 U.S. at 181. The undersigned finds that Cheryl had limited access to the home at best. While she did retain a key and security access code, her stated purpose to enter the home was to retrieve personal items and mail. As noted earlier, she was not a co-owner of the property and the primary mission between May 10, 1997, and August 8, 1997, was to conduct searches on behalf of the government. Other cases relied on by the government in the context of consensual searches do not fit the particular facts of this case. In *United States v. Brannan,* 89 F.2d 108 (9th Cir. 1990) the estranged wife was a co-owner of the property. In *United States v. Trzaska,* 859 F.2d 1120 (2nd Cir. 1988), the estrangeed wife had recently left the apartment, agents returned with her and searched while she removed her personal items. There were no multiple entries under pretextual reasons. The same scenario was presented in *United States v. Long,* 524 F.2d 660 (9th Cir. 1975).

Similarly, in *United States v. Smith,* 930 F. 2d 1081 (5th Cir. 1991), the court found that although the estranged wife allowed the defendant to occupy

the dwelling; she was the co-lessee and had been granted exclusive use and control of the premises in the divorce proceeding. Such is not the facts in the instant case.

The undersigned will not bother distinguishing the cases relied on by the government further. All involve individuals who could consent to search because they had authority over the premises and joint access and control for most purposes as required by *Illinois v. Rodriguez. Id.* As stated repeatedly, such was not the case in the searches conducted by Cheryl Shelton.

The undersigned respectfully submits that the conduct of the government in these warrantless searches should not be condoned. Cheryl Shelton sought out the government and received immunity for her actions in the alleged skimming operation. She was also paid over $7,000 for cooperation, was relocated to Florida, and afforded protection from the government. While it is convenient to say she was entering the house primarily for her personal items, that premise is simply not supported by the facts. Cheryl Shelton entered the home to retrieve evidence against defendant Shelton and at the direction and acquiescence of the government. Moreover, she did not have the access and control over the premises necessary for a valid consenual search. The government could have obtained a warrant – and they should have. A Fourth Amendment violation occurred on the entries and searches of defendant Shelton's home on May 10, 1997, and thereafter.

Accordingly, it is recommended that the items seized on May 10, 1997, and thereafter by Cheryl Shelton be suppressed and excluded from evidence.

The parties are referred to 28 U.S.C. 636(b)(1) and F.R.Civ.P. 72(b) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging the factual findings on appeal. *United States v. Carrillo-Morales,* 27 F.3d 1054, 1061-62 (5th Cir. 1994), *cert. denied* by *Austin v. United States,* 513 U.S. 1178, 115 S.Ct. 1163, 130 L.Ed.2d 1119 (1995); *Douglass v. United Services Auto. Ass'n,* 70 F.3d 335 (5th Cir. 1995).

Respectfully submitted, this 19th day of November, 2001.

/s/ Jerry A. Davis
UNITED STATE
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60943

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JIMMY DOUG SHELTON,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

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ON PETITION FOR REHEARING

(Filed Sep. 10, 2009)

Before HIGGINBOTHAM, BARKSDALE, and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham
United States Circuit Judge